

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

RECEIVED

AUG 06 2004

Appeal of Selectmen of the Town of Nottingham
Docket No. 04-15-WC

OBJECTION TO THE MOTION TO DISMISS THE APPEAL

The Selectmen of the Town of Nottingham ("Nottingham"), object to the Defendant's motion to dismiss the appeal because the Department has misunderstood the relationship between the Water Council's role under RSA 21-O and the provisions of RSA 485C. This appeal is properly before the Council because of its obligation under RSA 21-O to review all decisions of the Department's Water Division and thus the Motion to Dismiss should be denied.

Introduction

The Department's Motion to Dismiss is based upon a misunderstanding of the relationship between RSA 21-O which establishes mandatory review by the Water Council of all decisions of the Water Division of the Department and RSA 541 which establishes uniform procedures for rehearings and appeals. The proper interpretation of these two statutes is that the Water Council is required to hear this appeal under RSA 21-O and its hearing is consistent with the procedures set out in RSA 541.

This matter involves questions of great importance to the water policy of the State of New Hampshire and the Water Council is mandated by law to be involved in resolution of those questions. New Hampshire's water policy is generally set forth in RSA 481:1 which states in pertinent part:

"... the water resources of the state are subject to an ever increasing demand for new and competing uses. The general court declares and determines that the water of New Hampshire whether located above or below ground constitutes a limited and therefore

precious and invaluable public resource which should be protected, conserved and managed in the interest of present and future generations.... The maximum public benefit shall be sought... ." (emphasis added).

Factual and Procedural Background

This is an appeal by Nottingham from a decision by the Department to issue a permit for the withdrawal of 307,000 gallons per day (113 million gallons per year) to USA Springs from a bedrock aquifer in Nottingham, New Hampshire. The water is to be withdrawn from the aquifer and bottled for sale. Thus, unlike most groundwater withdrawals, all water is to be removed completely from the aquifer with no possibility of recharge. Evidence in the record demonstrates that the withdrawal allowed by the Department is not sustainable and that bedrock and overburden aquifers will be dewatered.

The permit was issued despite:

- The Department finding that the pumping of this water would draw in a plume contamination which exists in the aquifer due to disposal practices on an adjacent property.
- The Department conditioning of the permit to be implemented only at some uncertain date in the future when the contaminated plume has achieved ambient ground water quality standards, which in essence grants a "future right" to the applicant. By doing so, the Department has violated the requirement of its own regulations that it consider the impact of the withdrawal on other competing uses in place at the time withdrawal is to occur.
- The Department issuing the permit where it has found that the withdrawal would impact private water supply wells as far away as 7,000 feet from the extraction wells, thus impacting an area nearly 3 miles across.
- The Department issuing the permit despite the fact that the Department admits that it does not know the nature and extent of adverse impacts which will occur to private water supplies and wetlands.
- Instead of following the water policy of the state to seek maximum public benefit in its decisions, the Department has relied upon its assumption that a monitoring system (which is untested) of a poorly understood aquifer will be adequate to allow the applicant to

identify and report adverse impacts and to allow the Department to take enforcement action before any irreversible harm has occurred.

Nottingham believes that the Department's approach is inconsistent with the water policy of the State of New Hampshire because it puts the public groundwater resource at risk and therefore contravenes the policy of the law to preserve the maximum public benefit of water supplies.

New Hampshire law is clear matters of such importance to the water policy of the state to be reviewed and resolved by the Water Council.

ARGUMENT

The Water Council should accept jurisdiction over this appeal because RSA 21-O mandates the Council to review all decision of the Department emanating from the Water Division

1. RSA 21-O establishes the Department of Environmental Services and sets up a system of independent appeals boards, (e.g., the Water Council, the Waste Management Council, the Air Resources Council, and the Wetlands Council). The legislature established these independent councils to resolve important issues raised by Department decision making. RSA 21-O:7 states:

“The water council shall hear and decide all appeals from department decisions relative to the functions and responsibilities of the division water other than department decisions made under RSA 482-A relative to the wetlands, in accordance with RSA 21-O:14”. (emphasis supplied)

RSA 21-O:14 provides that following a hearing before the Water Council, appeals shall be conducted in accordance with RSA 541.

2. Large groundwater withdrawals are regulated under RSA 485-C:21. That statute states in pertinent part:

“Rehearings and appeals from a decision of the department under this section shall be in accordance with RSA 541.”

3. The Department has moved to dismiss the appeal arguing that the language of RSA 485-C:21 should be interpreted to exclude the Water Council from review of decisions relating to large groundwater withdrawals, a matter of significant public interest. The Department argues that since RSA 485-C:21 states that rehearings and appeals shall be “in accordance with RSA 541”, the legislature must have intended to bypass the normal appeal process mandated by RSA 21-O:7 to the Water Council. There is nothing to support this strained interpretation which is inconsistent with fundamental purpose of Water Council authority, with the plain language of the statutes and with standards of statutory construction recognized under New Hampshire law. Proper application of these principles demonstrates that the two statutes are consistent should be read to give effect to both.

The Department misunderstands the relationship between RSA 541 and RSA 21-O and so its motion must be denied.

4. RSA 541 simply sets out a uniform procedure for processing rehearings and appeals. Because it is procedural, it does not, by its terms, exclude any step in the appeal process, such as an intermediate review by the Water Council. In fact, the Water Council procedures themselves are subject to the uniform procedures prescribed by RSA 541. Accordingly, nothing in RSA 541, or in RSA 485C:21 which refers to RSA 541, limits the Water Council jurisdiction.

The Department's position ignores principles of statutory construction and so its

Motion to Dismiss should be denied.

5. In matters of statutory interpretation, our Supreme Court requires that statutes be read in harmony with the overall statutory scheme. The Court requires that statutes be construed so they do not contradict each other. Nillson v. Bierman 150 N.H. 393 (2003). If a reasonable construction of the two statutes taken together can be found, the Court will not find that there has been an implied repeal or limitation of one by the other. State v. Mullin 115 N.H. 662 (1975). Applying these principles requires a finding of jurisdiction of this matter with the Water Council.

6. RSA 21-O contains precise and mandatory language of an overall statutory scheme concerning the Water Council's jurisdiction. It states that the Water Council shall hear and decide all appeals from department decisions of the division of water other than department decisions made under RSA 482-A. The legislature was very clear that it wanted the Water Council involved as an intermediate appellate review board of all decisions of the water division except those having to do with wetlands. RSA 21-O was most recently amended June 26, 2000, post-dating the passage of RSA 485-C:21 (effective August 1, 1998) upon which the Department relies. Thus, had the legislature wanted to exclude large groundwater withdrawals from the jurisdiction of the Water Council, it could have done so specifically, as it did for wetlands. The legislature chose not to exclude large groundwater withdrawal decisions. It simply said that the procedures of RSA 541 would apply.

The Departments position exaggerates the significance of the reference to RSA 541 in the large ground water withdrawal procedures.

7. The Department urges a broader reading of RSA 485-C:21 than it is due. The

section does not state, as it could have if the legislative intent was as the Department urges, that the Water Council will not be involved in appeals from large groundwater withdrawal permits. Rather, it simply states that rehearings and appeals under this section shall be in accordance with RSA 541. Of course, appeals from the Water Council decisions are in accordance with RSA 541 as set forth in RSA 21-O:14. RSA 485-C and RSA 21-O can be and should be read consistently to give effect to both, with review first by the Water Council and ultimately appeal in accordance with RSA 541.

Review by the Water Council of these important issues is consistent with the fundamental purpose of the Council.

8. Review of this matter by the Water Council is the most reasonable construction. There is no basis for assuming that the legislature intended to exclude large groundwater withdrawals from review by the Water Council especially where the independent review by the Council is such a fundamental part of the structure of the department. The legislature's statement of water policy in RSA 481:1 demonstrates that its recognition of the state's role as trustee of its water resources is so important that an intent to remove the Council's role from review of large groundwater withdrawals should not be implied and would certainly have been specifically expressed if intended. The legislature's establishment of the Water Council as the independent appeals board for review of water policy decisions is equally broad and mandatory. Where it intended to exclude an area of review from the Water Council's jurisdiction, such as wetlands, it did so explicitly.

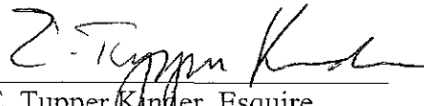
9. The Water Council should accept this appeal which raises such critical issues for state water policy and deny the Department's Motion to Dismiss and schedule this matter for a hearing.

Respectfully submitted,

TOWN OF NOTTINGHAM SELECTMEN

By its attorneys,
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Dated: August 6, 2004



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, first class, and postage prepaid Michael Nolin, NHDES, Harry Stewart, NHDES, Mark Beliveau, Esquire, Armand Hyatt, Anthony Soltani, Esquire, and Assistant Attorney General Richard Head.



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